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May 3, 2022

The Honorable Hildy Bowbeer
Magistrate Judge of U.S. District Court
United States District Court
316 N. Robert Street
St. Paul, MN 55101

Re: *Blue Cross and Blue Shield of North Carolina, et. al. v. Rite Aid Corporation and Rite Aid Hdqtrs. Corp.* Case No. 0:20-cv-01731-ECT/HB

Dear Magistrate Judge Bowbeer,

As instructed, attached please find the hearing transcript and order from proceedings before the Superior Court of the State of Delaware in the case of *Envolve Pharmacy Solutions v. Rite Aid* (N19C-12-214).

Sincerely,
/s/ K. Jon Breyer
K. Jon Breyer, Esq.

cc: All Counsel (via ECF)

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I N D E X

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**PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' PRODUCTION
OF DOCUMENT - Page 4 .**

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1 Monday, 11 April 2022

2 9:00 a.m.

3 Zoom via CourtScribes

4 PRESENT

5 AS NOTED:

6 **THE COURT:** Counsel, good morning.

7 This is the time the Court has set
8 to hear the Motion to Compel that has been
9 filed in Envolve v. Rite Aid.

10 Would you tell me who is presenting
11 on behalf of each side?

12 Mr. DeSanto, you seem to be breaking
13 up. Why don't you give it another try.

14 You are just coming in and out. I
15 don't know what -- you have a bad connection,
16 or something.

17 **MR. DESANTO:** Is this better?

18 **THE COURT:** That is better.

19 **MR. DESANTO:** Maybe I am sitting a
20 little too far from my desk.

21 Is that better?

22 **THE COURT:** Much better.

23 **MR. DESANTO:** Sorry about that.

1 **THE COURT:** Who is arguing this?

2 **MR. SULLIVAN:** This is Tom Sullivan
3 from Shook Hardy, and I will present for Rite
4 Aid.

5 **THE COURT:** Go ahead, Mr. DeSanto,
6 present your motion.

7 **MR. DESANTO:** Good morning, Your
8 Honor.

9 May it please the Court, my name is
10 Jerome DeSanto. I am going to be presenting
11 today's Motion to Compel against Rite Aid on
12 behalf of the Plaintiffs.

13 I will be referring to Plaintiffs
14 collectively on this motion as Centene.

15 By way of brief background, Your
16 Honor, this case arises from Rite Aid
17 misreporting of its usual and customary
18 charges on claims submissions for
19 prescription drug claims that it submitted to
20 Centene for reimbursement.

21 Rite Aid misreported its U&C charges
22 under various contracts affecting the
23 Parties' relationship by excluding its RSP

1 program pricing from its U&C submissions on
2 prescription drug costs.

3 **THE COURT:** Mr. DeSanto, we can
4 agree, though, that that U&C definition had a
5 particular definition applicable to these
6 agreements; correct?

7 **MR. DESANTO:** So, yes, Your Honor,
8 we agree that there are numerous contracts at
9 issue in this case.

10 There is the 2003 contract between
11 Envolve and Rite Aid. There is the 2013
12 contract between Envolve and Rite Aid. Those
13 contracts underlie Envolve's breach of
14 contract claim against Rite Aid.

15 There are also numerous contracts
16 with third-party PBMs, Caremark and Argus,
17 which --

18 **THE COURT:** Mr. DeSanto, that is not
19 the question I asked you at all.

20 Is there one unified definition of
21 U&C for the purposes of this litigation and
22 these contracts?

23 **MR. DESANTO:** We think that the

1 definition of U&C across all contracts that
2 are at issue in this case are consistent, and
3 that they are clear, and that they require
4 Rite Aid to include in its calculation of U&C
5 its program pricing.

6 Our position with respect to -- so
7 there are two discovery requests that are at
8 issue, general discovery requests that are at
9 issue, on this Motion to Compel.

10 The third is what I will refer to as
11 the State Medicaid discovery. And the State
12 Medicaid discovery, what we are seeking here
13 are communications and documents relating to
14 Rite Aid's reporting of its usual and
15 customary charge to State Medicaid agencies;
16 relevant extrinsic evidence as to what the
17 contracts at issue mean when they define the
18 term U&C in the event a court determines a
19 need to go outside the four corners of the
20 agreement at issue to determine what U&C
21 means.

22 Again, our position is that --

23 **THE COURT:** And this gets me back to

1 my first question, that the Court is going to
2 have to go outside of contractual language
3 here.

4 **MR. DESANTO:** Our position is that
5 the contracts are clear and consistent, and
6 that Rite Aid violated their terms.

7 However, Rite Aid has indicated
8 through its own actions in discovery the need
9 that it may need to consider extrinsic
10 evidence because we are not quite sure what
11 position Rite Aid is going to take in this
12 case with respect to the contracts, if they
13 are clear or not, and what its position with
14 respect to contractual meaning is.

15 And because we can't predict at this
16 point whether or not the Court is going to
17 need to go outside the four corners, or if
18 Rite Aid is going to press the Court in going
19 outside the four corners of the contracts,
20 both Parties at this point in time are
21 engaged in the process of collecting
22 extrinsic evidence as to the contractual
23 meaning.

1 Rite Aid has been doing this. It
2 has taken the position in other litigations
3 that an industry meaning of U&C defaults to
4 exclusion of RSP pricing.

5 It has it has indicated a position
6 in this case that it may take that the
7 industry standard of U&C, that there is no
8 uniform understanding of U&C.

9 But what Rite Aid has been doing in
10 discovery, as is Centene, is it has engaged
11 in taking discovery of extrinsic evidence.
12 Rite Aid has sought -- specifically industry
13 standard evidence, or trade usage evidence.

14 Rite Aid has sought industry
15 standard evidence of least seven third
16 parties, including other pharmacies and PBMs,
17 about their respective understandings of U&C
18 and program pricing.

19 It is industry standard evidence
20 from Centene seeking from Centene its own
21 agreements and communications with other
22 pharmacies about U&C pricing.

23 And even discovery has sought from

1 Centene -- and this is an important one --
2 industry standard evidence from Centene by
3 seeking from Centene Centene's own
4 communications with government entities about
5 U&C pricing.

6 So, really, I think the point here
7 today, Your Honor, is both Parties are
8 engaged in building up their own respective
9 pots of extrinsic evidence and industry
10 standard evidence in the event the Court
11 needs to go outside the four corners of the
12 agreements in resolving this case.

13 Rite Aid has been doing it.

14 And, so, we think that the State
15 Medicaid discovery issued in its first
16 discovery request is relevant evidence of how
17 the industry understands U&C.

18 U&C functions in the same way for
19 state Medicaid fee-for-service as it does for
20 commercial payers, Medicare Part E
21 contractors.

22 The requirements, there are many
23 state Medicaid regulations near or

1 substantially similar to the U&C requirements
2 in private contracts between pharmacies,
3 PBMs.

4 And there is the Seventh Circuit in
5 the seminal case *Garbe* recognized the
6 substantial similarities between Medicaid
7 regulations on U&C, private contracts on U&C,
8 and Federal regulations on U&C.

9 Our amended complaint shows the
10 substantial similarities between Medicaid
11 relations on U&C, the private contracts on
12 U&C, and the Federal regulations on U&C.

13 Rite Aid, in its brief, in its
14 amicus brief, in the *Garbe* case made an
15 argument about industry understanding of U&C
16 in that case. And it actually cited -- and
17 we include that as Exhibit A to our Motion to
18 Compel -- they state to state Medicaid
19 regulations in their industry standard
20 argument with respect to U&C.

21 And, again, just to highlight, Rite
22 Aid, in all of the discovery requests, is
23 seeking from Centene Centene's own

1 communications, relevant entities, relating
2 to U&C pricing.

3 So in short on this first discovery
4 request, there is nothing materially
5 different about Medicaid discovery that
6 should take it outside the relevant industry
7 standard evidence that the Parties have been
8 taking from another.

9 And if Rite Aid is getting to take
10 its own industry standard discovery, Centene
11 should be able to do the same. And the state
12 Medicaid discovery is relevant evidence of
13 how the industry understands U&C.

14 **THE COURT:** As to this specific area
15 but all of them, how do you answer your
16 friend's overbreadth problem that you are
17 asking for any and all; basically for
18 everything?

19 **MR. DESANTO:** So we don't know what
20 we don't know.

21 We don't know what communications
22 Rite Aid has had with certain state Medicaid
23 agencies.

1 We do know about our communications
2 with at least the State of Connecticut's
3 Medicaid agency. That was next referenced in
4 Rite Aid's amicus brief in the *Garbe* case.

5 We do know that Rite Aid has had
6 communications with the State of Oregon state
7 Medicaid agency about reporting U&C. That is
8 another one that is mentioned in Rite Aid's
9 amicus brief in the *Garbe* case.

10 **THE COURT:** Okay.

11 **MR. DESANTO:** Moving on then, we
12 also think state Medicaid evidence, briefly,
13 Your Honor, is relevant to the statute of
14 limitations issue that Rite Aid has put at
15 issue in this case.

16 Rite Aid has argued statute of
17 limitations. Centene has argued in response
18 to that argument the tolling doctrine of
19 fraud and concealment.

20 Again, based on Rite Aid's *Garbe*
21 brief, upon information and belief,
22 Connecticut state Medicaid called Rite Aid
23 out for U&C reporting practices in 2010.

1 Upon further information and belief,
2 Oregon State Medicaid called Rite Aid out in
3 2011 for its reporting in U&C.

4 Despite having notice from each
5 state Medicaid agency that what Rite Aid was
6 doing was possibly improper with respect to
7 its reporting of U&C, Rite Aid continued hide
8 from the rest of the industry, Centene
9 included, its U&C reporting practices. And
10 we think this cuts right to the question of
11 whether Rite Aid, quote, knew about the
12 wrongfulness of its actions, an element of
13 the fraudulent concealment doctrine that this
14 Court noted in its motion to dismiss opinion.

15 The State Medicaid discovery is,
16 therefore, we think, relevant to the statute
17 of limitations issue. We think it cuts to
18 whether they had notice of the alleged
19 wrongfulness of its actions. And that is
20 relevant to the statute of limitations
21 argument that is going to be had in this
22 case.

23 So Rite Aid mentions in its brief

1 that it might be disproportionate to
2 producing this evidence to the needs of the
3 case. We don't think so. This is a \$200
4 million case. We don't think a custodian or
5 two to pull these documents would be overly
6 burdensome.

7 Rite Aid also raises issue of that
8 some of these documents may be privileged.
9 We think that is a red herring, and it is not
10 an excuse to withhold this category of
11 documents. This wholesale communications
12 with state Medicaid entities, by their very
13 nature, would not be privileged as it would
14 be involving third parties sufficient to
15 break the attorney-client privilege.

16 So unless the Court has questions
17 about this first discovery request, state
18 Medicaid discovery, I am happy to move on to
19 our second request.

20 **THE COURT:** That is fine, move on.

21 **MR. DESANTO:** So the second request
22 is the other litigation's discovery. I will
23 as refer to it as that.

1 So our brief identifies three
2 litigations, the *Rahimi* case, the *Stafford*
3 case, and *Humana* case as other litigations
4 with substantially similar allegations to
5 Rite Aid's misreporting of its usual
6 customary charge. They all center upon that
7 core issue.

8 And our focus here on this second
9 discovery request, this other litigation's
10 discovery, is on the transcripts; deposition
11 transcripts from current and former Rite Aid
12 employees, witness testimony transcripts,
13 sworn statements from current or former Rite
14 Aid employees, and interrogatory responses
15 from Rite Aid.

16 We think that these transcripts
17 would be highly relevant here.

18 We understand that former or current
19 Rite Aid employees or executives gave
20 testimony in these cases of U&C pricing,
21 about its program, how it operated;
22 essentially about the very issues that cut to
23 the heart of this case. And that these

1 transcripts are, again, relevant, and they
2 would also cut to the need for us to gather
3 this information to either corroborate
4 witness testimony, or to impeach it; that
5 there is obvious deficiencies here with
6 respect to the transcripts.

7 If we were to gain access to them,
8 we could begin to truncate the length of
9 depositions, the need to go over certain
10 topics in deposition. We could narrow the
11 issues for deposition; or, perhaps, in some
12 cases, eliminate the need for certain
13 depositions.

14 So our focus here on this is really
15 with respect to the transcripts, and the
16 interrogatory responses that Rite Aid
17 employees, former employees, gave in these
18 other matters.

19 The second part of this other
20 litigation's discovery are the document
21 production sets that Rite Aid produced in
22 these other matters.

23 Again, the issue across the cases is

1 essentially the same; it is was Rite Aid
2 required to report its program pricing in its
3 U&C submissions.

4 Our position here is that, look,
5 mistakes sometimes get made in submissions.
6 This is a belt and suspenders approach. We
7 want to make sure we are getting all of the
8 relevant documents that Rite Aid has or had
9 about U&C pricing, and program pricing. We
10 think it should be pretty efficient; not much
11 burden for Rite Aid to just reproduce these
12 production sets.

13 However, if Rite Aid does not want
14 to, or remains unwilling to produce its
15 production sets from these other litigations,
16 as a compromise we would be willing to accept a
17 commitment by Rite Aid to take those
18 production sets, apply the Parties' agreed
19 upon search terms, review those production
20 sets for responsiveness in this case, and go
21 about producing the documents that way.

22 That is something that Rite Aid has
23 not committed to yet in this case, but as a

1 compromise with respect to this, the
2 documents in the other litigation's
3 discovery, we would be willing to accept
4 that, as well.

5 So unless the Court has further
6 questions, we respectfully request that the
7 Court compel production of the two discovery
8 requests at issue on this motion. And I will
9 reserve whatever time I have remaining for
10 rebuttal.

11 **THE COURT:** We have already gone
12 over your time, but that is fine.

13 **MR. DESANTO:** Okay.

14 **THE COURT:** I will hear from the
15 other side.

16 **MR. SULLIVAN:** Your Honor, Tom
17 Sullivan for Rite Aid. May it please the
18 Court.

19 I want to focus in on one thing
20 counsel said in his argument because I
21 believe it really goes to the heart of the
22 issue with regard to the Medicaid
23 fee-for-service request. That is, they said

1 that Medicaid fee-for-service functions in
2 the same way as the agreements here. That is
3 not the case. It is not accurate.

4 Medicaid fee-for-service is a
5 creature of state statute, of state
6 regulation, and of the guidance at the state
7 level. It is not a creature of contract.

8 The issues here are dictated by
9 contract.

10 This is a commercial case, a
11 commercial contract case, between Rite Aid
12 and Centene. There is no state statute, or
13 state regulation. And that is important,
14 because I think that it dovetails with
15 another point that counsel made.

16 They said that they need this
17 evidence for purposes potentially of
18 interpreting the contracts. Well, I was
19 surprised to hear that because there really
20 is no mention of that in their brief.

21 Their brief, their motion, does not
22 connect up in any way how it is that any one
23 of these State's statutes that govern the

1 fee-for-service area could be used as
2 interpretive guidance for any one of the
3 definitions that are in the agreements that
4 are at issue in this case. So that makes it
5 --

6 **THE COURT:** What about your friend's
7 suggestion that basically how you interact
8 with these agencies, though, no matter what
9 the statute says, and if somebody claims
10 there is some ambiguity in this, may go to
11 how do you, in the marketplace, determine
12 U&C.

13 **MR. SULLIVAN:** Your Honor, every one
14 of those state statutes and regulations is --
15 they are individualized. I haven't compared
16 them to the particular agreements at issue.

17 And if their position is that those
18 state statutes and regulations can be used as
19 a guide, that is exactly what they would need
20 to do.

21 The agreements at issue here --

22 **THE COURT:** No, I am not saying
23 that -- and I don't believe that is what I

1 heard -- not that those statutes are the
2 guide, but your client's interaction with
3 those agencies, how you determine U&C there.
4 And maybe specifically in the guides it says
5 discount programs don't play a factor. Maybe
6 they do; maybe the State regulations are
7 different.

8 But if someone says U&C is
9 determined basically by how we deal with the
10 market, and it goes across both private
11 insurers, state insurers, Federal insurers,
12 and overall you don't use discount programs
13 as part of that, are you willing to commit
14 right here that there is no ambiguity in this
15 statute, and it is going to be a straight
16 look at the wording of the statute.

17 **MR. SULLIVAN:** Your Honor, I would
18 say --

19 **THE COURT:** Not the wording of the
20 statute, I apologize; the wording of the
21 contracts.

22 **MR. SULLIVAN:** Your Honor, I would
23 say that the -- for one thing, the state

1 Medicaid fee-for-service is a whole different
2 market.

3 The term "U&C," the phrase "U&C," is
4 certainly used there, there is no question.
5 But that market -- I mean, for example, it is
6 its own market within Rite Aid.

7 Those terms are set at the political
8 level by state legislatures, by the
9 regulators.

10 I know that there are variations
11 between those, I know that they differ among
12 them. I don't know all of the history behind
13 each one of those for sure, but those
14 negotiations are clearly different, and have
15 clearly a different history, and a different
16 context, and a different background than any
17 definitions at issue in this case, even if
18 there is the need for extrinsic evidence.

19 And I don't know that right now.
20 That was not an issue. It was teed up in the
21 motion, frankly. They talked about notice,
22 they talked about fraudulent concealment, and
23 statute of limitations.

1 And, frankly, a lot of the -- they
2 talked -- Mr. DeSanto mentioned the discovery
3 we were doing of third parties. There is a
4 lot of discovery of third parties, Your
5 Honor, precisely because we believe there is
6 wide industry knowledge about how these
7 programs worked. That is certainly a
8 critical reason for the discovery that has
9 been at issue. And we believe it is
10 compelling, because it shows that Centene, in
11 our view, certainly would have known, or
12 should have known.

13 So, Your Honor, the issue with the
14 Medicaid fee-for-service is it really is a --
15 it is a completely different bucket. And not
16 only is it irrelevant, but it, therefore,
17 also imposes a significant burden if we would
18 have to go collect for that, if we would have
19 to produce all of that.

20 There has been a significant amount
21 of discovery already in this case.

22 Numerous custodians were produced.
23 We have reviewed hundreds of thousands of

1 documents; produced over, I think, 25,000
2 documents to date. This would add on -- for
3 an issue that is not even relevant -- would
4 add on an incredible amount of burden, and is
5 disproportional to the needs of this case,
6 which is really about resolving a
7 disagreement about a contract between these
8 Parties; not anything to do with Medicaid
9 fee-for-service.

10 And, in fact, unless I have missed
11 it, the Medicaid fee-for-service business is
12 not even at -- not even one of the
13 Plaintiffs' businesses who are parties in
14 this case.

15 They are not saying that Medicaid
16 fee-for-service is -- that they are engaged
17 in that by one of these Plaintiff parties.

18 So it is a combination of relevance
19 and proportionality and burden, really. It
20 adds nothing to resolving the claims or
21 defenses here, in our view, and imposes a
22 significant burden.

23 **THE COURT:** Your friend talked more

1 about the state programs.

2 What about the FEP program, where
3 they say the matter in which U&C is
4 determined for that was more similar, or use
5 contractual language that was similar here.

6 **MR. SULLIVAN:** Your Honor, I believe
7 in that instance that is -- I think what they
8 are referring to, or the reference there was
9 to an issue, a historical issue, that related
10 to the role of Caremark in a contract for
11 processing claims on behalf of FEP. That is
12 a private agreement. That is not a Medicaid
13 fee for-service-issue.

14 That, as I understand the issue, is
15 really about communications with Caremark,
16 which is a third party, that is clearly
17 distinct from a Medicaid fee-for-service, or
18 a state agency.

19 I don't know -- unless I have missed
20 it, I don't think that that is squarely an
21 issue in their Motion to Compel here. I
22 think it was an issue that was raised in the
23 amicus brief that they referred to that they

1 believe supports their position here.

2 Frankly, we believe they
3 mischaracterize the position we took in
4 *Garbe*.

5 The point of *Garbe* was simply to
6 point out that U&C is a concept that is at
7 issue in two different spaces, in two
8 different areas;

9 One is in the area of private
10 contract, and one is in the State Medicaid
11 fee-for-service agreement.

12 And it is noteworthy, too -- and we
13 make this point in our brief, Your Honor --
14 that even *Garbe* noted the variation between
15 state regulations in its opinion, and noted
16 that the State regulations and those state
17 statutes are sometimes exceptions to a
18 definition of U&C.

19 Your Honor, one quick point on the
20 notice issue.

21 They suggest that the Medicaid
22 fee-for-service inquiries, to the extent
23 there are some, would put us on notice that

1 what we were doing was wrong. I don't think
2 that really would be evidence of notice in
3 the first instance. And, secondly, all of
4 those inquiries, or any of those inquiries,
5 really relate to that state's particular
6 understanding of their own statute, of their
7 own regulations, and not any agreement that
8 is at issue between these parties.

9 So I think that distinction in terms
10 of how Medicaid's fee-for-service works
11 really is dispositive of the issue here. It
12 is not based on a contract, it is not based
13 on a private negotiation, and has a far
14 different history.

15 I will address, Your Honor, as
16 well -- unless Your Honor has more questions
17 on the Medicaid fee-for-service issue --
18 address the issue of so-called other
19 litigation requests.

20 First, they mention three cases:
21 *Rahimi, Stafford, and Humana.*

22 Your Honor, *Stafford* is a consumer
23 case. It involves different issues than the

1 issues at play here, which are, again,
2 between the insurer and the pharmacy, and
3 don't have to do with the consumer.

4 And then *Rahimi* and *Humana* also
5 dealt with different issues, different
6 contracts, have different protective orders,
7 from my understanding. And the issues
8 testified to in those cases would be
9 specific, I believe, to the issues in those
10 litigations. And they are, obviously,
11 governed by protective orders in those
12 different litigations.

13 They mention the need for
14 efficiency, and they think that if they have
15 those transcripts, that it would make
16 discovery more efficient in this case; yet,
17 they have requested the same custodians,
18 identified the same potential witnesses,
19 haven't articulated in any way how things
20 would be more efficient.

21 They are trying to basically -- and
22 they acknowledged it on the next issue --
23 trying to basically get every scrap of paper

1 through a belts and suspenders approach that
2 they possibly can, ignoring the burden and
3 proportionality concerns that are part of the
4 Delaware rules, and part of the
5 considerations that relate to this motion.

6 **THE COURT:** But as to these two, if
7 I recall correctly, and I am just looking, we
8 are talking about three cases, we are talking
9 about specifics of discovery and depositions
10 that were taken in those cases, and only
11 those portions that would relate to the U&C
12 and how it is developed. Right?

13 **MR. SULLIVAN:** Your Honor, I
14 don't -- I didn't hear that limitation in
15 counsel's argument, and I can't make a
16 representation about what is in those
17 transcripts precisely. I know these
18 litigations did relate to U&C. U&C was at the
19 heart of the issues. I can't tell you what
20 particular testimony there was about those
21 things there.

22 And, clearly, I think counsel would
23 have to acknowledge, the contracts are

1 different, the relationships are different,
2 the parties are different, the histories of
3 the negotiations are different. All of that
4 is different. All of that is not the same
5 here.

6 **THE COURT:** Okay.

7 **MR. SULLIVAN:** In terms of document
8 production, Your Honor, I think a little bit
9 of context is important, because this really
10 is another burden issue.

11 We have, as counsel knows, collected
12 a large number of documents. We believe that
13 that collection includes the same documents
14 that would have been collected -- that were
15 collected in those other litigations.

16 And the documents here that have
17 been collected have been reviewed for
18 responsiveness, and privilege, and whatnot,
19 and had been produced -- are being produced
20 in this litigation.

21 The documents in those other
22 litigations are responsive to those requests
23 in those cases. And what counsel has asked

1 us to do is to take those productions and
2 essentially -- and we would have to bear this
3 burden -- re-reviewing them for purposes of
4 this case, when we believe that the documents
5 collected in those other litigations are
6 essentially from the same universe of the
7 documents collected here.

8 So it is basically forcing us -- it
9 would force us to the expense of reviewing
10 things that we have already reviewed before,
11 as we understand it.

12 And they acknowledge that this is a
13 belts and suspenders approach. But that
14 belts and suspenders approach, again, is not
15 sensitive to the costs.

16 Frankly, Your Honor, the amount that
17 we have spent reviewing documents here could
18 buy us a very nice house. I mean, this is an
19 extraordinary amount of money that has been
20 spent reviewing documents, and belt and
21 suspenders is not the standard imposed on a
22 producing party, on a reviewing party. Not
23 to mention the fact, Your Honor, that all of

1 those documents, they are subject to
2 different protective orders, they relate to
3 different agreements.

4 The consumer case may involve
5 sensitive HIPAA information that we do have a
6 protective order here, but it is different,
7 as we understand it. And that is why, as
8 well, Your Honor, those documents would need
9 to be re-reviewed, to some extent. And that
10 is a meaningful expense, as you know.

11 Your Honor, unless you have further
12 questions, I think you have a sense of our
13 position, at this point.

14 **THE COURT:** Thank you.

15 Mr. DeSanto.

16 **MR. DESANTO:** Thank you, Your Honor.
17 Very briefly.

18 One, I just wanted to point out that
19 Centene is the largest Medicaid managed care
20 payer in the country, and that U&C, at least
21 in terms of how U&C functions as a ceiling
22 for reimbursement, functions similarly
23 substantially the same way as it does for

1 Medicaid fee-for-service.

2 Number Two, Rite Aid has treated
3 Medicaid fee-for-service, state Medicaid
4 agencies in the industry the same way as it
5 has treated insurance companies with respect
6 to its reporting practices of U&C.

7 It treated FEP payers the same way,
8 it treated private insurance companies the
9 same way, it treated state Medicaid payers
10 the same way with respect to its reporting
11 practices, unless and until it was called out
12 by certain of those Medicaid agencies.

13 So Rite Aid itself really didn't
14 recognize a difference when it came to its
15 reporting practices.

16 And the last thing I want to
17 mention, Your Honor, is with respect to,
18 again, our focus is on the transcripts of
19 current and former Rite Aid employees in
20 these other matters do not invoke a
21 protective order issued from those other
22 cases.

23 Rite Aid would not need to seek the

1 permission to produce its testimony in those
2 other matters in this case.

3 And Rite Aid, in how it opposed the
4 motion here, shows some efficiencies that can
5 be used with permitting production of these
6 transcripts from other cases.

7 Rite Aid itself cited a transcript
8 from another case, and appended it as an
9 exhibit to its opposition brief with respect
10 to this motion.

11 And, so, we think that production of
12 these transcripts from current/former Rite
13 Aid employees are not only relevant, but
14 would make it more streamlined for purposes
15 of this litigation.

16 **MR. SULLIVAN:** Your Honor, if I may
17 respond just briefly.

18 **THE COURT:** Sure.

19 **MR. SULLIVAN:** Medicaid managed care
20 is not Medicaid fee-for-service. It's not.
21 It is a different business line.

22 It is not governed by statute.
23 Medicaid managed care is governed by

1 contract.

2 Second, Counsel says this evidence
3 would show that we treated everybody the same
4 way. Well, what matters here again, Your
5 Honor, is the contract, and that contract is
6 different than the State statute. And, now,
7 that response suggests that they don't really
8 need it for interpretive purposes; that they
9 are trying to use it for something else, and
10 it is not really clear what that is.

11 Finally, as to the transcripts, Your
12 Honor, I don't know -- I can't represent
13 exactly what is in those transcripts. But
14 those cases involve different arrangements,
15 involve different agreements, and it is
16 certainly possible, and I believe it is
17 likely, that the testimony, to the extent
18 those involve different business
19 relationships, would, at least to some
20 extent, fall under the POs in those cases.
21 So that is certainly an additional burden on
22 top of the relevance issues.

23 **THE COURT:** Well, have you looked at

1 those agreements to see whether or not they
2 used the same definitions?

3 **MR. SULLIVAN:** I have not seen the
4 *Humana* agreements, Your Honor.

5 Those agreements are typically
6 protected under the protective order in those
7 cases.

8 **THE COURT:** I have heard from both
9 of you. We have taken 40 minutes on a
10 discovery motion. I am ready to rule on the
11 motion itself.

12 Superior Court Civil Rule 26(b)(1)
13 does provide that parties may obtain
14 discovery regarding any non-privileged matter
15 that is relevant to any party's claim or
16 defense, and proportional to the needs of the
17 case.

18 As a general rule, the information
19 sought in discovery is relevant if there is
20 any possibility that the information sought
21 may be relevant to the subject matter of the
22 action before the court.

23 When challenged, there are certain

1 burdens that the plaintiffs have to
2 demonstrate to the court that it is relevant,
3 and that it is over burdensome. Actually,
4 both parties carry certain burdens there, but
5 I think I have heard enough to know where
6 those lie.

7 This is a matter that is governed
8 specifically by contract language, neither
9 party of which has been fully willing to
10 settle on being unambiguous, but also neither
11 of which, given the sophistication of the two
12 parties, the Court should believe has some
13 strong argument for ambiguity.

14 I do note the difference between the
15 types of payment systems here that are
16 involved between the State Medicaid agencies
17 and how those may be determined, and third
18 parties, such as we are talking about, or
19 other parties, such as we are talking about
20 here.

21 What the Court is going to do is
22 this:

23 At this point, I just do not see a

1 significant showing of relevance as to the
2 requests under basically the government
3 agency, the State Medicaid agencies. So that
4 would be Number 6, and Number 11, and if I
5 remember correctly, Number 10.

6 As to 27, I find two things. One, I
7 don't see that there is a threshold of
8 relevance there.

9 Those agreements, or the work done
10 with those state agencies, are done pursuant
11 to statutes and regulations, and there has
12 simply not been enough presented to the Court
13 to believe that the statutory regulatory
14 language is similar to the agreements that
15 are set forth here, such that it would give
16 any assistance in determining what
17 interpretive meaning of the U&C here. Again,
18 note, neither party has truly argued that
19 there is ambiguity in this contractual
20 language, and I just don't see that there has
21 been enough to tell me that it will be
22 needed, at this point.

23 On the other hand, I do believe that

1 Rite Aid has shown that there will be
2 substantial burden in trying to go through
3 all of that.

4 Using those two factors, the Court
5 finds that as to 6, 10, and 11 -- I apologize
6 if I don't have the numbers quite right here,
7 but let me make sure.

8 Six, 10 and 11, the motion is
9 denied.

10 As to 26, The Court is granting that
11 motion as to production limited to the
12 *Rahimi*, *Stafford*, and the *Humana* matters.

13 Any documents will be limited using
14 the search terms already agreed upon within
15 those discovery materials, and is ordering
16 the transcripts of former and present Rite
17 Aid employees, specifically as to methods and
18 factors used by Rite Aid to determine the
19 U&C.

20 As to 27, I find that that is,
21 again, overly burdensome and really not very
22 focused; whereas, 26 I find is a bit more
23 focused, and especially when we limit it to

1 these three litigations, or arbitrations,
2 that were identified.

3 This production shall be made on or
4 before May 2nd of 2022.

5 The Parties may extend this period
6 of my stipulation after a meet and confer
7 regarding the production, because I know that
8 there has been some discussion before.

9 I will file this Order, which is
10 basically a marked up Order, some time this
11 morning.

12 **MR. SULLIVAN:** Your Honor, may I ask
13 one conceptual point of clarification; I do
14 believe it is potentially important.

15 My understanding -- and it is not a
16 full understanding because I was not involved
17 in the case -- is that *Rahimi* is an FCA case,
18 I believe, and may -- the essential question
19 is, to the extent that there are Medicaid
20 fee-for-service issues in any of those cases
21 that I am not aware of sitting here right
22 now, or the particularities of it, I would
23 assume that those would not be relevant, and

1 would not need to be produced pursuant to the
2 same ruling that covered 6, 10 and 11.

3 It is a conceptual issue. We are
4 happy to raise it in a meet and confer, if
5 necessary, and tee that up more clearly. But
6 I don't have full visibility into the
7 particularities of what was raised in each
8 one of those cases.

9 **THE COURT:** Well, Mr. Sullivan, at
10 this point, because I am talking about just
11 three particular litigations, I have narrowed
12 the scope of the potential that is out there.

13 To the extent it may that those
14 litigations may have crossed into that area,
15 I am going to deem that they are relevant for
16 now.

17 But you can meet and confer on it,
18 and if there needs to be some clarification
19 after it is reviewed, I will deal with it
20 then.

21 I will tell you that I will lean
22 towards, I have narrowed the scope of it so
23 greatly that a bit of overlap into other

1 state Medicaid programs that may have been
2 brought up in that litigation. This is \$200
3 million case. That bit of overlap, or that
4 bit of excess there, is not bothersome to the
5 Court, and may be, in some way, relevant
6 because it is the overall theme of the
7 litigation taken there. Okay?

8 **MR. SULLIVAN:** Thank you, Your
9 Honor.

10 **THE COURT:** All right.

11 **MR. DESANTO:** Thank you, Your Honor.

12 (Time noted: 9:49 a.m.)

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1 CERTIFICATE OF COURT STENOGRAPHER

2 I, Lisa J. Amatuucci, RPR, CSR, Official
3 Court Stenographer of the Superior Court, State of
4 Delaware, do hereby certify that the foregoing is
5 an accurate transcript of the proceedings had, as
6 stenographically reported by me, in the Superior
7 Court of the State of Delaware, in and for New
8 Castle County, in the case herein stated, as the
9 same remains of record in the Office of the
10 Prothonotary at Wilmington, Delaware, and that I am
11 neither counsel nor kin to any party or participant
12 in said action, nor interested in the outcome
13 thereof. This certification shall be considered
14 null and void, and the transcript will be
15 uncertified, if the transcript is disassembled
16 and/or copied and/or distributed and/or shared in
17 any manner by any party without authorization of
18 the signatory below.

19 WITNESS my hand this Twenty-Sixth Day of
20 April 2022.

21
22 /s/ Lisa J. Amatuucci, RPR, CSR
23 Lisa J. Amatuucci, RPR, CSR
Official Court Stenographer

<p>MR. DESANTO: [13] 4/16 4/18 4/22 5/6 6/6 6/22 8/3 12/18 13/10 15/20 19/12 33/15 43/10</p> <p>MR. SULLIVAN: [13] 5/1 19/15 21/12 22/16 22/21 26/5 30/12 31/6 35/15 35/18 37/2 41/11 43/7</p> <p>THE COURT: [25] 4/5 4/17 4/21 4/23 5/4 6/2 6/17 7/22 12/13 13/9 15/19 19/10 19/13 21/5 21/21 22/18 25/22 30/5 31/5 33/13 35/17 36/22 37/7 42/8 43/9</p>	<p>A</p> <p>a.m [2] 4/2 43/12</p> <p>able [1] 12/11</p> <p>about [30] 4/23 9/17 9/22 10/4 11/15 12/5 13/1 13/7 14/11 15/17 16/21 16/22 18/9 18/21 21/6 23/21 23/22 24/6 25/6 25/7 26/1 26/2 26/15 30/8 30/9 30/16 30/20 38/18 38/19 42/10</p> <p>accept [2] 18/16 19/3</p> <p>access [1] 17/7</p> <p>accurate [2] 20/3 44/5</p> <p>acknowledge [2] 30/23 32/12</p> <p>acknowledged [1] 29/22</p> <p>across [3] 7/1 17/23 22/10</p> <p>action [2] 37/22 44/12</p> <p>actions [3] 8/8 14/12 14/19</p> <p>actually [2] 11/16 38/3</p> <p>add [2] 25/2 25/4</p> <p>additional [1] 36/21</p> <p>address [2] 28/15 28/18</p> <p>adds [1] 25/20</p> <p>adds nothing [1] 25/20</p> <p>affecting [1] 5/22</p> <p>after [2] 41/6 42/19</p> <p>again [11] 7/22 11/21 13/20 17/1 17/23 29/1 32/14 34/18 36/4 39/17 40/21</p> <p>against [2] 5/11 6/14</p> <p>agencies [9] 7/15 12/23 21/8 22/3 34/4 34/12 38/16 39/3 39/10</p> <p>agency [5] 13/3 13/7 14/5 26/18 39/3</p> <p>agree [2] 6/4 6/8</p> <p>agreed [2] 18/18 40/14</p> <p>agreement [4] 7/20 26/12 27/11 28/7</p> <p>agreements [14] 6/6 9/21 10/12 20/2 21/3 21/16 21/21 33/3 36/15 37/1 37/4 37/5 39/9 39/14</p> <p>ahead [1] 5/5</p> <p>AID [59]</p> <p>Aid's [5] 7/14 13/4 13/8 13/20 16/5</p> <p>al [2] 1/4 1/7</p> <p>ALEXANDRA [1] 2/5</p> <p>all [15] 6/19 7/1 11/22 12/15 12/17 16/6 18/7 23/12 24/19 28/3 31/3 31/4 32/23 40/3 43/10</p> <p>allegations [1] 16/4</p> <p>alleged [1] 14/18</p> <p>already [4] 19/11 24/21 32/10 40/14</p> <p>also [7] 6/15 13/12 15/7 17/2 24/17 29/4 38/10</p> <p>am [10] 4/19 5/10 15/18 21/22 30/7 37/10 41/21</p>	<p>42/10 42/15 44/10</p> <p>AMATUCCI [4] 1/21 44/2 44/22 44/22</p> <p>ambiguity [4] 21/10 22/14 38/13 39/19</p> <p>amended [1] 11/9</p> <p>amicus [4] 11/14 13/4 13/9 26/23</p> <p>among [1] 23/11</p> <p>amount [4] 24/20 25/4 32/16 32/19</p> <p>and/or [3] 44/16 44/16 44/16</p> <p>another [6] 4/13 12/8 13/8 20/15 31/10 35/8</p> <p>answer [1] 12/15</p> <p>any [17] 12/17 20/22 20/22 21/2 23/16 28/4 28/7 29/19 37/14 37/15 37/20 39/16 40/13 41/20 44/11 44/17 44/17</p> <p>anything [1] 25/8</p> <p>apologize [2] 22/20 40/5</p> <p>APPEARANCES [1] 2/1</p> <p>appended [1] 35/8</p> <p>applicable [1] 6/5</p> <p>apply [1] 18/18</p> <p>approach [4] 18/6 30/1 32/13 32/14</p> <p>APRIL [3] 1/13 4/1 44/20</p> <p>arbitrations [1] 41/1</p> <p>are [63]</p> <p>are trying [1] 29/21</p> <p>area [4] 12/14 21/1 27/9 42/14</p> <p>areas [1] 27/8</p> <p>argued [3] 13/16 13/17 39/18</p> <p>arguing [1] 5/1</p> <p>argument [7] 11/15 11/20 13/18 14/21 19/20 30/15 38/13</p> <p>Argus [1] 6/16</p> <p>arises [1] 5/16</p> <p>arrangements [1] 36/14</p> <p>ARSHT [1] 2/3</p> <p>articulated [1] 29/19</p> <p>as [45]</p> <p>ask [1] 41/12</p> <p>asked [2] 6/19 31/23</p> <p>asking [1] 12/17</p> <p>assistance [1] 39/16</p> <p>assume [1] 41/23</p> <p>attorney [1] 15/15</p> <p>attorney-client [1] 15/15</p> <p>authorization [1] 44/17</p> <p>Avenue [1] 2/7</p> <p>aware [1] 41/21</p>	<p>28/12</p> <p>basically [8] 12/17 21/7 22/9 29/21 29/23 32/8 39/2 41/10</p> <p>be [35] 4/12 5/10 5/13 12/11 14/21 15/1 15/5 15/8 15/13 15/14 16/17 18/10 18/16 19/3 21/1 21/18 22/15 28/2 29/8 29/20 33/9 35/5 37/21 38/17 39/4 39/21 40/1 40/13 41/3 41/23 42/1 42/18 43/5 44/13 44/14</p> <p>bear [1] 32/2</p> <p>because [12] 8/10 8/15 19/20 20/14 20/19 24/5 24/10 31/9 41/7 41/16 42/10 43/6</p> <p>been [17] 4/8 9/1 9/9 10/13 12/7 24/9 24/20 31/14 31/17 31/17 31/19 32/19 38/9 39/12 39/21 41/8 43/1</p> <p>before [5] 1/9 32/10 37/22 41/4 41/8</p> <p>begin [1] 17/8</p> <p>behalf [3] 4/11 5/12 26/11</p> <p>behind [1] 23/12</p> <p>being [2] 31/19 38/10</p> <p>belief [2] 13/21 14/1</p> <p>believe [16] 19/21 21/23 24/5 24/9 26/6 27/1 27/2 29/9 31/12 32/4 36/16 38/12 39/13 39/23 41/14 41/18</p> <p>below [1] 44/18</p> <p>belt [2] 18/6 32/20</p> <p>belts [3] 30/1 32/13 32/14</p> <p>better [4] 4/17 4/18 4/21 4/22</p> <p>between [13] 6/10 6/12 11/2 11/6 11/10 20/11 23/11 25/7 27/14 28/8 29/2 38/14 38/16</p> <p>bit [5] 31/8 40/22 42/23 43/3 43/4</p> <p>both [5] 8/20 10/7 22/10 37/8 38/4</p> <p>bothersome [1] 43/4</p> <p>Box [1] 2/4</p> <p>breach [1] 6/13</p> <p>break [1] 15/15</p> <p>breaking [1] 4/12</p> <p>brief [13] 5/15 11/13 11/14 13/4 13/9 13/21 14/23 16/1 20/20 20/21 26/23 27/13 35/9</p> <p>briefly [3] 13/12 33/17 35/17</p> <p>brought [1] 43/2</p> <p>bucket [1] 24/15</p> <p>building [1] 10/8</p> <p>burden [10] 18/11 24/17 25/4 25/19 25/22 30/2 31/10 32/3 36/21 40/2</p> <p>burdens [2] 38/1 38/4</p>	<p>burdensome [3] 15/6 38/3 40/21</p> <p>business [3] 25/11 35/21 36/18</p> <p>businesses [1] 25/13</p> <p>buy [1] 32/18</p>
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 Case No. N19C-12-214 PRW



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ENVOLVE PHARMACY SOLUTIONS,)
 INC., et al.,)

Plaintiffs,)

v.)

RITE AID HDQTRS. CORP., et al.,)

Defendants.)

C.A. No. N19C-12-214 PRW
 [CCLD]

~~PROPOSED~~ ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL
DEFENDANTS' PRODUCTION OF DOCUMENTS

The Court, having reviewed Plaintiffs' Motion to Compel Defendants' Production of Documents, and for good cause shown,

IT IS HEREBY ORDERED this 11th day of April, 2022, that:

1. The Motion is GRANTED.

2. On or before May 2, 2022
 Within ~~ten~~ business days of entry of this Order, Defendants shall

produce documents responsive to Requests ~~26, and 27~~ of Plaintiffs' First

Requests for Document Production to Defendants.

The parties may extend this period by stipulation after a meet-and-confer regarding this production.


 The Honorable Paul R. Wallace

production
 * As to No. 26 ~~and 27~~ limited to Rahimi, Stafford, and Humana and will be limited to use of search terms within the discovery materials and the transcripts of former and present Rite Aid employees ~~and~~ specifically as to methods and factors used by Rite Aid to determine UAC.